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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-479

STANLEY D. EDMONDS,
Petitioner,

vs.

COMPAGNIE GENERALE TRANSATLANTIQUE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF AMICUS CURIAE, PACIFIC MERCHANT SHIPPING ASSOCIATION

GRAYDON S. STARING
Two Embarcadero Center
San Francisco, California 94111
Attorney for Pacific Merchant Shipping Association as Amicus Curiae.

Of Counsel:
LILLICK MCHOSE & CHARLES
EDWARD M. KEECH

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7852

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BRIEF OF AMICUS CURIAE, PACIFIC MERCHANT SHIPPING ASSOCIATION

INTEREST OF PACIFIC MERCHANT SHIPPING ASSOCIATION

Amicus curiae, Pacific Merchant Shipping Association, is a voluntary association of American steamship companies.[1] They are exposed to injury claims of longshoremen and engaged in frequent litigation of such claims in the federal district courts and may be considered representative of numerous other American steamship companies also involved in such litigation.

This case raises an important question concerning the meaning of the 1972 Amendments to the Longshoremen's

[1]Alaska Hydro-Train (a division of Crowley Maritime Corporation), American President Lines, Matson Navigation Company, United States Lines, Inc., and Farrell Lines.

and Harbor Workers' Compensation Act as to the relative responsibilities of stevedore and shipowner for the ultimate burden of compensation. Those Amendments made a number of changes in the Act intended to shift the emphasis sharply back toward the compensation security features of the Act and away from lawsuits, whether between longshoreman and vessel or between vessel and stevedore, and, consistent with that aim, provided dramatic but much needed increases in the compensation benefits payable under the Act. Those benefits are normally insured. As in the past, members of the Association now pay the resulting higher premiums for such insurance, so far as the premiums are attributable to the stevedoring of their own vessels, as a distinct element of the rates which they pay to their stevedore contractors.

The Association and its members are keenly interested in interpretations of the Act which will result in achieving the broad purposes of the 1972 Amendments by providing longshoremen with the ample benefits and long-term security which the Act provides, unburdened by a heavy overlay of attorneys' fees, by shifting the emphasis back where it belongs to the compensation features of the Act; by eliminating numerous costly and confusing problems in the past administration of the Act; and by ensuring that litigation, when it does ensue, will be equitably determined in accordance with the overall aims of the Amendments and current views on the distribution of loss among those responsible for it.

SUMMARY OF ARGUMENT

I.A. The 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act re-focus the Act upon liberal compensation benefits rather than third-party suits.

The Act covers a great many workers, most of whom are not longshoremen or harbor workers. Prior to 1972 the value of the benefits under the Act had failed to keep up with the cost of living, and longshoremen and harbor workers alone obtained relief by shifting the emphasis of their recoveries from compensation benefits to third-party suits, facilitated by the warranty of seaworthiness under the *Sieracki* case.[2] Although in the very beginning the third-party suit provisions of the Act had been directed primarily to the interests of employers in recouping their payments of compensation, the decline in the value of those benefits shifted control of that action to the injured worker as a major source of compensation. The 1972 Amendments to the Act made a number of reforms, principally an increase of benefits to realistic levels and a return to compensation benefits as the normal mode of compensating the injured employee, with a consequent elimination of a vast overburden of legal expense upon the whole system.

B. In the years before 1972 the Act was afflicted with chronic problems of interpretation related to its jurisdictional scope shoreward, the unavailability of contribution from the negligent employer to a shipowner held without fault for unseaworthiness, and the grant and expansion of a remedy of complete indemnity under the *Ryan* case,[3] which spawned a conflict of interest because of the employers' potential indemnity liability, so that employees

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[2] *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 1946 A.M.C. 698 (1946).

[3] *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 1956 A.M.C. 9 (1956).

were allowed to file third-party suits on claims which had been statutorily assigned to their employers under the terms of the Act.[4] It was then even held that the employer might in some circumstances also have an action of its own to recover compensation benefits upon somewhat different grounds.[5] These developments of the law with respect to harbor workers represented an ever-increasing disparity between their treatment and that of the land-based majority of private employees covered by the Act, as well as those government employees covered by the other federal compensation act.[6] There was also increasing confusion about the distribution of recoveries in third-party suits and responsibility for protecting rights in them and paying attorneys' fees to recover them. But the most significant problem was that third-party actions and related litigation overrode the basic compensation aims of the Act and tended to diminish the long-term security of the worker.

C. The explicit reforms of the 1972 Amendments include not only dramatically higher compensation and the right to recover attorneys' fees for obtaining it, but reforms in the geographical jurisdiction of the Act, abolition of the warranty of seaworthiness with respect to vessels and of the vessel owner's corresponding right to recover indemnity from employers and the substitution of a new and exclusive negligence remedy against vessels, based upon traditional common law standards ashore. While the

[4] *Czaplicki v. HOEGH SILVERCLOUD*, 351 U.S. 525, 1956 A.M.C. 1465 (1956).

[5] *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404, 1969 A.M.C. 745 (1969).

[6] *Federal Employees' Compensation Act*, 5 U.S.C. §§ 8101 *et seq.*

standards for recovery for vessel negligence are still being worked out in the lower courts, great progress has been made toward the development of a rational standard harmonizing the duties of the shipowner toward the longshoreman and toward his stevedore employer, and it remains here to harmonize other features of the reformed third-party cause of action.

D. The disposition of this case may well involve not only the vital legal question directly presented but also the express or implied answers to a number of other questions. These include the nature and relationship of claims against third parties, the existence of a lien and responsibility for protecting it, the possibility of successive suits arising from the same matter and the responsibility for litigation expense and allocation of proceeds and the uniformity of treatment of employees and of employers. Most important among them is whether effect is to be given to the policy of the Act that negligent employers have an economic incentive to safety and that routine substitution of third-party suits for compensation and consequent diversion of funds to pay attorneys' fees and litigation expenses be discouraged.

II.A.1. The limitation of plaintiff's recovery from the vessel to the percentage of damages equal to the vessel's percentage of fault follows clearly from the statute itself, the policy of the statute and equitable principles. Section 5(b) of the Act, added by the 1972 Amendments, does not explicitly deal with the question of joint negligence of vessel and employer, but the first three sentences, when construed to yield parallel results in the situations with which they deal, mean that the vessel is to be held

only for its own negligence, and not for damages allocable to the employer's portion of the total negligence, thus charging the vessel with only its fair share of damages and denying indemnity to the stevedore employer for only that portion of the compensation loss allocable to the employer's own fault.

2. The result will promote safety for, as this Court has recognized, the stevedore employer ordinarily has the superior opportunity and principal burden to protect the longshoreman from danger, and Congress intended that the stevedore employer continue to have a strong incentive to provide on-the-job safety. Before 1972, the imposition of the burden of safety on the employer was accomplished by way of an indemnity action, but that course is now impossible. The lower courts have frequently expressed concern that the stevedore's incentive for safety not be destroyed. The remedies of contribution and indemnity have been foreclosed, and the result below takes account of the fairly obvious truth that the stevedore's negligence will generally exceed that of the vessel, because the stevedore exercises actual control of the work and its employees are present in numbers.

3. The rule of the court below is supported by a line of authority in the District of Columbia, under which both the private employees who form the majority of the employees covered by the longshoremen's Act and the public employees covered by the companion Federal Employees' Compensation Act recover reduced damages where the injury was contributed to by the negligence of the employer.[7]

[7] *Murray v. United States*, 405 F.2d 1361 (D.C.Cir. 1968); *Dawson v. Contractors Transport Corp.*, 467 F.2d 727 (D.C.Cir. 1972).

4. The equitable doctrine advocated here produces consistent equitable results, with the employer receiving back only the fair proportion of his expenses attributable to the third-party negligence and having that portion of his burden occasioned by his own negligence not lifted from him by indemnification.

B.1. None of the arguments urged against the ruling below has merit. The result is not harsh upon the longshoreman, although it is perhaps less generous to lawyers than the rule sought by the plaintiff would be. The real question today is not whether the worker will be appropriately compensated, but where the primary burden of that compensation shall be borne and through what channels the burden shall be passed, as it ultimately must be, to the shipowner and with what added burden of inefficiency, uncertainty and legal expense and with what incidental loss of valuable security to the injured workers who settle their suits.

2. The invocation of the formula of "joint and several liability" does not provide a suitable guideline. The formula has no application and as an analogy will not bear analysis. The formula deals only with the situation in which a plaintiff has a choice of collecting his damages from either party, and is based upon a policy of security for the plaintiff which is inapplicable here, where the security is provided by the Act and compensation is guaranteed. There is indeed no joint liability possible in this case, and without joint liability the expression "joint and several liability" means nothing. It is simply an attempt to beg the question involved in the case, which is the extent of

the separate liability of the shipowner under the terms of the Act.

3. Neither is the case to be disposed of by reference to "contribution", a remedy not sought nor in any way involved in the case. The shipowner seeks no recovery from the stevedore employer (whose underwriter as *amicus* here admits indeed that it is not a joint tortfeasor). What is involved in the background of the case, of course, is whether the employer and its underwriter should recover full indemnity at the expense of the shipowner. The denial of such full indemnity, if that be the ultimate result of the ruling below, cannot properly be called contribution between joint tortfeasors without a considerable distortion of language.

III.A. There is no reason at all why the rule adopted below should multiply proceedings, for there is but a single claim having identical elements, and whether the claim is brought by the longshoreman or his employer, the presence of the employer as an additional party should not normally be necessary. The confusion which existed before the 1972 Amendments is clarified by the return to a single claim against the vessel limited to the proportion of damages caused by its negligence. The Act from the beginning contemplated but one third-party claim arising from an injury, which was to be clearly in the hands of either the employer or the employee and normally the former. Then problems gave rise to the judicial recognition of separate claims, but since the 1972 Amendments there is a single joint claim in which both the employer and the employee have an interest. The joint interest can be fully protected in a single suit, whichever party sues being held as trustee

for the other party, and this disposes of the old problem of attorneys' fees by charging them against the total recovery before distribution.

B. There is also no reason at all why the rule adopted below should complicate proceedings by introducing the stevedore as a third party in actions against the vessel, a result which has been suggested by others, as there is but one joint claim against the vessel in which the longshoreman and stevedore have the identical interest to minimize the finding of stevedore negligence, so as to produce the maximum recovery of damages, and each has the motive to co-operate with the other. Whichever brings the action, there will ordinarily be no motive for the other to intervene as a party; such intervention would be warranted only by a conviction of inadequate representation by counsel, in which case, upon a proper showing, the protection of permissive intervention under the federal rules would be available, as in any similar case in which non-parties have an economic interest.

IV. The affirmance of the rule laid down in the court below and its amplification in accordance with the equitable doctrine we advocate will operate strongly to further the purposes of the Longshoremen's and Harbor Workers' Compensation Act, and particularly of the 1972 Amendments to the Act, by placing the emphasis back where it belongs upon compensation benefits, protecting workers in their lifelong entitlement to such benefits, and reducing reliance upon third-party suits which are burdensome to the courts and to all concerned because of the additional economic load which they produce, and will lead to the easy

resolution of a number of incidental legal problems which have produced difficulty in the past.

ARGUMENT

I. THE OPPORTUNITY SHOULD BE TAKEN TO DECIDE THIS CASE UPON A BASIS WHICH WILL FURTHER THE AIMS OF THE 1972 AMENDMENTS, NOT ONLY BY RESTORING THE EMPHASIS UPON COMPENSATION, BUT ALSO BY ELIMINATING PREVIOUS PROBLEMS AND HARMONIZING DOCTRINES INVOLVED

A. The 1972 Amendments to the Longshoremen's Act Are Intended to Provide a Liberal System of Compensation Benefits And End Reliance of the Worker Upon Third Party Suits to Obtain Adequate Relief

The Longshoremen's and Harbor Workers' Compensation Act[8] was passed in 1927 to provide workmen's compensation benefits for longshoremen and other shore-based maritime workers, such as ship repairmen. It has since been extended to other groups of employees for whom the federal government, rather than the states, is responsible, and, as of 1972, it was reported that of the 800,000 employees covered by the Act only about 225,000 were longshoremen or harbor workers while the largest single group of 400,000 were the employees of private employers in the District of Columbia.[9] The vast number of civilian govern-

[8] 33 U.S.C. §§ 901 *et seq.*

[9] J. Cohen and D. Dougherty, *The 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act: An Opportunity for Equitable Uniformity In Tripartite Industrial Accident Litigation*, 19 N.Y.L. Forum 587, 596 (1974); *cf. Comment*, 27 U. of Miami L. Rev. 94 (1972). D.C. private employees are brought

ment employees in the District of Columbia and elsewhere are covered by other and earlier federal legislation, the Federal Employees' Compensation Act,[10] with which the Longshoremen's and Harbor Workers' Act should presumably be construed *in pari materia.*

From the time it was passed, the Longshoremen's and Harbor Workers' Compensation Act has contained a provision[11] for suits against third-party tortfeasors to recoup past compensation benefits and obviate the employer's payment of future ones. As the years went by, the Act suffered from the same weakness as the state compensation acts generally did; its benefits were not raised to realistic levels to keep up with the cost of living and wages. The ever-mounting pressure resulting from inadequate benefits was relieved through third-party actions, principally by the granting of the seaman's warranty of seaworthiness to longshoremen in *Seas Shipping Co. v. Sieracki*[12] in 1946 and by the fantastic expansion of the scope of the doctrine in longshoremen's cases in subsequent years.

At the outset, the Act reflected the primary interest of the employer in third-party recoveries, as a means of re-

under the Act by the District of Columbia Workmen's Compensation Act, 45 Stat. 600 (1928). Other workers covered by the Act are civilian employees at military bases outside the United States by virtue of the Defense Base Act of August 16, 1941, 42 U.S.C. §§ 1651-54; employees of federal contractors outside the United States by virtue of the War Hazards Compensation Act of December 2, 1942, 42 U.S.C. §§ 1701-06, 1711-17; employees under the Outer Continental Shelf Lands Act of August 7, 1953, 43 U.S.C. §§ 1331-43; and certain employees of nonappropriated funds instrumentalities of the armed forces under the Nonappropriated Funds Instrumentalities Act of June 19, 1952, 5 U.S.C. §§ 8171-73.

[10] 5 U.S.C. §§ 8101 *et seq.*

[11] 33 U.S.C. § 933.

[12] 328 U.S. 85, 1946 A.M.C. 698 (1946).

ducing or recouping its compensation exposure, by placing control of such actions for all intents and purposes in the employer's hands through an assignment effective whenever an employee was paid compensation.[13] With the rise of the third-party suit as the principal means of obtaining substantial compensation in cases of any seriousness and the corresponding decline of interest on the part of the employer in recouping the all too modest compensation benefits, there was naturally pressure for control of the third-party suit by the worker rather than the employer.[14] This culminated in an amendment in 1959 by which the employee was allowed to take the compensation award and retain the opportunity to sue the third party for six months thereafter before the assignment became effective.[15]

The 1972 Amendments to the Act were specifically directed to a number of reforms. At their heart, however, lay a radical increase of benefits, including removal of fixed ceilings from disability benefits and future control by formulas related to wage levels generally,[16] by which the very reason for most other problems would be abated and the emphasis placed back where it belonged.

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[13]Act of Mar. 4, 1927, ch. 509, § 33, 44 Stat. 1440, 33 U.S.C. § 933(b).

[14]*See* Comment, 27 U. of Miami L. Rev. 94, 98 (1972):

> "When one views the dismal record of maximum allowable compensation under the Act, it is no wonder that third party lawsuits became a popular vehicle for making an injured worker 'whole'. . . ."

[15]Act of Aug. 18, 1959, Pub. L. 86-171, 73 Stat. 391, 33 U.S.C. § 933(a) and (b).

[16]33 U.S.C. § 906; *see* Comment, 27 U. of Miami L. Rev. 94, 104-05 (1972).

The Senate Committe said of the Amendments:

> The principal purpose . . . is to amend the . . . Act in order to upgrade the benefits, extend coverage to protect additional workers, provide a specified cause of action for damages against third parties, and to promulgate necessary administrative reforms.[17]

The Committee went on to say that the provisions of the amendments "will provide an adequate, prompt, and equitable system of compensation for the over 800,000 employees who depend upon its protection"[18] and that the Amendments would raise "benefits to a level commensurate with present day salaries and with the needs of injured workers whose sole support will be payments under the Act."[19]

Both the Senate and House Committees reported testimony that third-party actions had increased substantially in recent years, that much of the financial resources which should be utilized to pay better compensation benefits were being spent in supporting litigation and that in some cases workers were being encouraged to forego filing claims for compensation or to delay return to work to increase possible recovery in third-party actions.[20] The Senate Committee concluded:

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[17]S. Rep. 92-1125, 92d Cong., 2d Sess. 1 (1972).

[18]*Id.* at 2.

[19]*Id.* at 5.

[20]*Id.* at 9; H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 3, *reprinted in* [1972] U.S. Code Cong. & Ad. News 4698, 4702-03. The same problems can exist under the new law. The longshoreman may never receive his compensation award, may have no knowledge of what he is entitled to receive without substantial trial attorney's fees and costs, and may never have had the opportunity to decide whether it was worthwhile to him even to proceed with a third-party suit. The stevedore may pay temporary compensation money

> The social costs of these law suits, the delays, crowding of court calendars and the need to pay for lawyers' services have seldom resulted in a real increase in actual benefits for injured workers.[21]

Finally, the House committee, referring to the other federal workmen's compensation act, said:

> Congress demonstrated a deep concern for providing adequate workmen's compensation for injured American workers when they amended the Federal Employees' Compensation Act in 1966. The objective of Congress in the matter of workmen's compensation is clear. It is to provide a modern *workmen's compensation program* for a substantial number of American workers and their families.[22] [Emphasis supplied.]

B. Prior to the Amendments the Act Had Become Overburdened With Conflict and Confusion

The jurisdictional scope of the Longshoremen's and Harbor Workers' Act had been a nagging problem throughout the Act's life. As originally drawn, the Act was based on the admiralty power, was intended to reach as far into the waterfront as that power permitted and, unfortunately, was couched in terms of the relative powers of state and federal governments[23] so that every new question of its

and medical care and then make several "advances" of permanent compensation. In effect the stevedore helps plaintiff finance his suit against the vessel, while studiously avoiding a compensation award liquidating the final benefits due from the stevedore to the longshoreman.

[21] S. Rep., *supra* note 17, at 4.

[22] H.R. Rep., *supra* note 20, at 4711.

[23] "Compensation shall be payable . . . if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law." Act of Mar. 4, 1927, ch. 509, § 3(a), 44 Stat. 1426.

application in a given activity[24] or location[25] was a constitutional question. This led to the desperate expedient of the "twilight zone" doctrine under which the constitutional questions were avoided in close cases by treating the compensation claim as within whichever power, state or federal, was first asserted.[26] When this doctrine created at least as many problems as it solved, it was decided, in the *Calbeck* case,[27] to ignore the constitutional allusion in the Act, focus on other language, and apply the Act to all injuries upon navigable waters and in dry docks.

The admiralty jurisdiction of the courts had been extended ashore in cases of injury caused by vessels on navigable waters.[28] Despite abandonment of the constitutional test for its application, federal compensation did not follow the admiralty jurisdiction ashore but was held at the water line.[29] Inadequate as they frequently were, the benefits under the Act were often more liberal than those under state acts ashore and the third-party suit was again found to be the longshoreman's solution. An unseaworthiness remedy was established for injuries ashore caused by the operations of the vessel[30] and from that breakthrough

[24] *E.g.*, *Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469 (1922).

[25] *E.g.*, *Colonna's Shipyard, Inc. v. Lowe*, 22 F.2d 843, 1928 A.M.C. 94 (E.D. Va. 1927).

[26] *Davis v. Department of Labor & Industries*, 317 U.S. 249, 1942 A.M.C. 1653 (1942); *see* F. Gorman, *The Longshoremen's and Harbor Workers' Compensation Act—After the 1972 Amendments*, 6 J. of Mar. L. & Comm. 1, 5-7 (1972).

[27] *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114, 1962 A.M.C. 1413 (1962).

[28] Extension of Admiralty Act, 46 U.S.C. § 740.

[29] *Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 1969 A.M.C. 1967 (1969).

[30] *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206, 1963 A.M.C. 1649 (1963).

new third-party actions strained old doctrines, pressing them farther shoreward.[31]

We have already pointed out that the benefits under the Act were formerly inadequate and how the warranty of seaworthiness was created and expanded in the third-party suits to provide a potential, if frequently capricious, substitute. Equity might have suggested that an employer jointly at fault with the shipowner should contribute to damages recovered from the latter in a third-party action but the ultimate decision in the *Halcyon* case[32] was otherwise and the result, although well grounded in statutory language, was anything but equitable. It was shortly determined in the *Ryan case*,[33] however, that, while the shipowner could not have half a loaf, he could have a whole one, in the name of indemnity rather than contribution, and thus a new and opposite inequity was created under which not only employers but courts have frequently chafed.

Confusion and inconsistency also developed in connection with suits brought by the employer. The indemnity doctrine of the *Ryan* case created a conflict of interest for an employer who had taken a statutory assignment of the third-party claim, as to that portion of the potential excess recovery over compensation liability which might ultimately be paid to the employee, and consequently it was held

[31] *See, e.g., Gebhard v. S.S. Hawaiian Legislator*, 425 F.2d 1303, 1970 A.M.C. 2056 (9th Cir. 1970), *overruled in part by Victory Carriers, Inc. v. Law*, 404 U.S. 202, 1972 A.M.C. 1 (1971).

[32] *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 1952 A.M.C. 1 (1952).

[33] *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 1956 A.M.C. 9 (1956).

that, despite the assignment, the employee could maintain a separate third-party action.[34]

When an employer sued on an assigned claim, he had, of course, the cause of action which the employee had—no more nor less—and this could be grounded upon both maritime negligence concepts and the warranty of seaworthiness and was subject to the defense of the employee's contributory negligence. But it was eventually held by this Court that, in some circumstances, an employer had a potential cause of action for its compensation expenses against the vessel owner, based on a theory of independent tort against the employer and quite apart from assignment.[35] The employer's cause of action in such a case was for negligence only,[36] as no warranty of seaworthiness ran to its benefit,[37] and, under prevailing maritime principles, the claim was subject to reduction for the employer's own contributory negligence, including not only the negligence of the injured man but that of any others of its employees.

[34] *Czaplicki v. HOEGH SILVERCLOUD*, 351 U.S. 525, 1956 A.M.C. 1465 (1956).

[35] *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404, 1969 A.M.C. 745 (1969).

[36] *Id. at 415*, 1969 A.M.C. at 753.

[37] *Hugev v. Dampskisaktieselskabet International*, 170 F.Supp. 601, 1959 A.M.C. 439 (S.D. Cal. 1959), *aff'd adopting opinion below sub nom. Metropolitan Stevedore Co. v. Dampskisaktieselskabet International*, 274 F.2d 875, 1960 A.M.C. 591 (9th Cir. 1960), holding that the duty of the vessel to the employer is to exercise ordinary care to place the vessel, etc., in such condition that an expert and experienced stevedore, mindful of danger reasonably to be expected, will be able, in the exercise of ordinary care, to load or discharge the cargo in a workmanlike manner with reasonable safety and to give the stevedore reasonable warning of the existence of a latent danger not reasonably to be expected where the shipowner should reasonably expect the stevedore to encounter it.

These disparities in the treatment of longshoremen's injury claims themselves were matched by other disparities between the treatment of such claims and of comparable claims arising with respect to federal employees and the land-based majority of private employees covered by the Longshoremen's and Harbor Workers' Compensation Act. By contrast, under the Federal Employees' Compensation Act, where the employer has been jointly negligent with a third party against whom suit is brought, the latter has been held liable for only 50% of the damages, under equitable principles, the other moiety being deemed to have been statutorily compromised in the Compensation Act,[38] and the same rule applies to some 400,000 private employees in the District of Columbia under the Longshoremen's and Harbor Workers' Compensation Act.[39]

There was also confusion as to the existence and handling of so-called "liens" of employers for compensation expense, where employees had brought third-party suits. The Act was originally drawn contemplating that employers, as the parties primarily interested, would ordinarily be the ones to bring third-party suits, and detailed provision was made for the distribution of a third-party recovery by the employer.[40] But no comparable provision exists for distribution of a third-party recovery by an employee, the provision in that case being simply that the employer may take credit for such a recovery against any compensation liability it may have[41] and that an employee

[38]*Murray v. United States*, 405 F.2d 1361 (D.C. Cir. 1968).

[39]*Dawson v. Contractors Transport Corp.*, 467 F.2d 727 (D.C. Cir. 1972).

[40]33 U.S.C. § 933(e).

[41]*Id.* § 933(f).

who compromises a third-party claim without the consent of the employer (for whose ultimate benefit it exists) thereby waives further compensation benefits.[42]

As the emphasis shifted to third-party suits by employees, a practice arose of making voluntary payments of temporary disability compensation, pending suit and without a formal award which would result in a statutory assignment, and the question arose how such payments and medical expenses could be recouped out of the employee's third-party recovery. The statute then and now has made no provision for a lien for such amount.[43] The solution was found in a line of cases recognizing an equitable right in the employer to recover compensation benefits previously paid, out of the proceeds of the third-party action, thus treating the employee, in effect, as a trustee for the employer in bringing the action.[44] The lack of definition in this area has led to confusion as to when and against whom the compensation benefits could be recovered and to attempts to recover them directly from the third party rather than out of the damages received by the employee.[45]

A related problem was whether the third-party vessel owner had an obligation to protect the employer's interest

[42]*Id.* § 933(g).

[43]The dissent from the decision below *en banc* incorrectly states that the 1972 Amendments provided for a lien. 577 F.2d at 1157, 1978 A.M.C. at 1678.

[44]*The ETNA*, 138 F.2d 37, 1943 A.M.C. 1126 (3d Cir. 1943); *Fontana v. Pennsylvania R.R.*, 106 F. Supp. 461, 1952 A.M.C. 1535 (S.D. N.Y. 1952), *aff'd*, 205 F.2d 151, 1953 A.M.C. 1258 (2d Cir. 1953) and cases there cited.

[45]*See, e.g., Harris v. Westfal-Larsen*, 1964 A.M.C. 21 (N.D. Cal. 1963) (not otherwise reported).

in recouping compensation benefits out of third-party damages by paying them directly to the employer rather than to the plaintiff employee, leaving it to the latter to repay the employer and, on this point, the courts reached conflicting decisions.[46] Another related problem was the treatment of attorneys' fees. The Act allows the employer to deduct litigation expense as the first step in allocation of recovery under an assigned cause of action[47] but makes no such provision where the employee's attorneys' fees are concerned and the courts reached conflicting decisions on whether, when and to what extent the employer might be charged with a portion of the litigation expense from which he benefited.[48]

What had developed prior to the 1972 Amendments was a pattern in which third-party actions and related litigation over damages overrode and eclipsed almost entirely the basic compensation aims of the Act, under which workers were intended not to receive immediate large sums but to have lifetime medical care and disability protection. Prior to the Amendments, the Act made no provision for a compensation applicant to recover attorneys' fees and,

[46] *Compare International Terminal Operating Co. v. Waterman Steamship Co.*, 272 F.2d 15, 1960 A.M.C. 306 (2d Cir. 1959) *with Jarka Corp. of New England v. United States Lines Co.*, 387 F.2d 436, 1968 A.M.C. 487 (1st Cir. 1967); *see* Gorman, *supra* note 26 at 27-28.

[47] 33 U.S.C. § 933(e)(1)(A).

[48] *Compare Chouest v. A&P Boat Rentals*, 472 F.2d 1026, 1973 A.M.C. 1542 (5th Cir. 1973) *and Scozzari v. Jade Co.*, 350 F. Supp. 801, 1973 A.M.C. 1886 (E.D.N.Y. 1972) *with Haynes v. Rederi A/S Aladdin*, 362 F.2d 345, 1966 A.M.C. 2024 (5th Cir. 1966); *Russo v. Flota Mercante Grancolombiana, S.A.*, 303 F. Supp. 1404, 1969 A.M.C. 2096 (S.D.N.Y. 1969) *and Riddick v. Rederi A/B Fredrika*, 271 F. Supp. 360, 1967 A.M.C. 1808 (E.D. Va. 1967); *see* Gorman, *supra* note 26, at 24-26.

as awards themselves were low, the fees of workers' counsel, which had to be taken out of the awards, were very low in comparison to the contingent fees which could be obtained from third-party damages. The result was a serious and persistent conflict of interest for plaintiff's attorneys; a worker, whose best interest lay in lifetime protection from the still unknown consequences of his injury, could (and still can) lose that protection upon his lawyer's advice to bring a lawsuit and enter into a no-consent settlement[49] (the almost invariable kind), out of which the attorney would obtain a substantial percentage fee. That situation will continue to the extent that plaintiff's lawyers are motivated by the continued attractiveness of the third-party suit as an alternative to compensation proceedings in which fees are subject to scrutiny and control.[50]

C. The Amendments Explicitly Make Some of the Needed Reforms And Provide a Foundation for the Courts to Make a New Start Upon Construction to Avoid Other Problems of the Past

The 1972 Amendments explicitly make a number of important reforms. The central and most important one, of course, is the dramatic increase of compensation benefits[51] with a right to recover the attorney's fees for obtaining them.[52] The troublesome old geographical formula for the scope of the coverage was abandoned and coverage extended far enough ashore to embrace workers in the same work force as those aboard ship who would reasonably

[49] 33 U.S.C. § 933(g).

[50] *Id.* § 928.

[51] *Id.* §§ 906, 908.

[52] *Id.* § 928.

expect similar treatment.[53] The right of the shipowner to recover indemnity from the employer was abolished[54] and the longshoreman's cause of action against the vessel was completely reformed and restructured by eliminating the warranty of seaworthiness and restricting any such recovery to actual negligence[55] to be determined not, as formerly, in accordance with certain maritime doctrines but according to traditional common law standards ashore.[56] The *Halcyon* case,[57] too, correct though it be in its own situation, was left behind by history, with the material modification of the statute on which it was based.

It is appropriate to pause here and look more closely at the longshoreman's new cause of action against the vessel because of its significance in harmonizing rights of longshoremen and stevedore employers and because of its central importance in making the third-party suit again the exceptional, rather than the common, remedy.

Both the Senate and House Committees stated:

> The purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third-party damage action is concerned, and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called such as "unseaworthiness", "nondelegable duty", or the like.[58]

[53] *Id.* §§ 902(4). *See Northeast Marine Terminal Co. v. Caputo*, 429 U.S. 998, 1977 A.M.C. 1037 (1977).

[54] 33 U.S.C. § 905(b).

[55] *Ibid.*

[56] S. Rep., *supra* note 17, at 10; H.R. Rep., *supra* note 20, at 4703.

[57] Note 32, *supra*.

[58] S. Rep., *supra* note 17, at 10; H.R. Rep., *supra*, note 20, at 4703.

The Courts of Appeals have reached substantial agreement on the foundations of the standard of care in actions by the longshoreman against the vessel. Courts have turned to the land-based law of premise owners' liability to find traditional, non-maritime common law rules of liability while avoiding the application of peculiar rules from state law.[59] These rules articulate new uniform standards which do not embrace the displaced doctrine of unseaworthiness or forms of vicarious liability flowing from the imposition of non-delegable duties.[60]

Even in relatively specific details, the standards have remained harmonious. The most fundamental agreement, that the vessel is liable for its own active negligence which injures a longshoreman by, for example, dropping something on him, has not even required discussion. On the question of the vessel's liability for dangerous conditions, adherence to fundamental negligence principles has dictated that the vessel not be liable for conditions of which it neither knew nor should have known.[61] Substantial dis-

[59] S. Rep. *supra* note 17, at 10; H.R. Rep., *supra* note 20, at 4703; *Davison v. Pacific Inland Navigation Co.*, 569 F.2d 507, 508 n.1 (9th Cir. 1978); *Hurst v. Triad Shipping Corp.*, 554 F.2d 1237, 1977 A.M.C. 1625 (2d Cir. 1977); *Anuszewski v. Dynamic Mariners Corp.*, 540 F.2d 757, 1976 A.M.C. 2048 (4th Cir. 1976).

[60] *Hurst v. Triad Shipping Corp., supra* note 59; *Bess v. Agromar Line*, 518 F.2d 738, 1975 A.M.C. 1621 (4th Cir. 1975).

[61] *Anderson v. Iceland Steamship Co.*, 585 F.2d 1142 (1st Cir. 1978); *Wescott v. Impresas Armadoras, S.A.*, 564 F.2d 875 (9th Cir. 1977); *Riddle v. Exxon Transportation Co.*, 563 F.2d 1103 (4th Cir. 1977); *Ruffino v. Scindia Steam Navigation Co.*, 559 F.2d 861, 1977 A.M.C. 1289 (2d Cir. 1977); *Hurst v. Triad Shipping Co.; Munoz v. Flota Merchante Grancolombiana, S.A.*, 553 F.2d 837, 1977 A.M.C. 843 (2d Cir. 1977); *Brown v. Mitsubishi Shintaku Ginko*, 550 F.2d 331, 1977 A.M.C. 989 (5th Cir. 1977); *Gay v. Ocean Transport & Trading, Ltd.*, 546 F.2d 1233, 1977 A.M.C. 996 (5th Cir. 1977); *Bess v. Agromar Line*, 518 F.2d 738, 1975 A.M.C. 1621 (4th Cir. 1975).

pute seems to exist only on the issue of how much the policy of the 1972 Amendments and the expertise of the stevedore contractor limit the vessel's duty to warn of or correct obvious or known dangers,[62] but here a significant trend promises to harmonize the vessel's duty to the longshoreman with its well-established duty to his stevedore employer in a reasonable way so that the same conduct will be a breach as to both or neither.[63]

The courts having now made substantial progress in harmonizing the duties of the shipowner toward the longshoreman and toward his stevedore employer, the way is open to go forward and harmonize other features of the

[62]*See, e.g., Lubrano v. Royal Netherland Steamship Co.*, 572 F.2d 364, 1978 A.M.C. 826 (2d Cir. 1978); *cf. Anderson v. Iceland Steamship Co.; Davison v. Pacific Inland Navigation Co.*, 569 F.2d 507 (9th Cir. 1978); *Wescott v. Impressas Armadoras, S.A.*, 564 F.2d 875 (9th Cir. 1977); *Riddle v. Exxon Transportation Co.*, 563 F.2d 1103, 1978 A.M.C. 741 (4th Cir. 1977).

[63]In *Metropolitan Stevedore Co. v. Dampskisaktieselskabet International*, 274 F.2d 875, 1960 A.M.C. 591 (9th Cir. 1960), affirming and adopting *Hugev v. Dampskisaktieselskabet International*, 170 F. Supp. 601, 1959 A.M.C. 439 (C.D. Cal. 1959), the court, well before the 1972 Amendments established the basic duty of vessel to stevedore in terms (unaffected by the Amendments) based on Restatement of Torts § 343 (1934), now slightly modified as Restatement (Second) of Torts §§ 343 & 343A (1965) (see note 37, *supra*). This decision has been directly relied on by the Court of Appeals for the Fourth Circuit in stating the standard of care for longshoremen. *Riddle v. Exxon Transportation Co.*, 563 F.2d 1103, 1110-11 n.13, 1978 A.M.C. 741, 746 n.7 (4th Cir. 1977). Other decisions rely upon the same Restatement standard. *Brown v. Mitsubishi Shintaku Ginko*, 550 F.2d 331, 1977 A.M.C. 989 (5th Cir. 1977); *Gay v. Ocean Transport & Trading, Ltd.*, 546 F.2d 1233 1977 A.M.C. 996 (5th Cir. 1977); *Anuszewski v. Dynamic Mariners Corp.*, 540 F.2d 757, 1976 A.M.C. 2046 (4th Cir. 1976); *Napoli v. Hellenic Lines, Ltd.*, 536 F.2d 505, 1976 A.M.C. 551 (2d Cir. 1976). And *Wescott v. Impressas Armadoras, S.A., supra* note 61, the only decision of the Court of Appeals for the Ninth Circuit since 1972 directly involving the standard of care, while not discussing its earlier decision in *Metropolitan Stevedoring Co.*, is fully consistent with it.

third-party cause of action as reformed under the 1972 Amendments.

D. The Opportunity Is Presented in This Case to Construe the Act Upon a Sound and Forward-Looking Basis With a View to Future Clarity and Harmony and Promotion of the Policy of the Act

The instant appeal raises, in clear and simple terms, a vital legal question. The answer to it involves, either expressly or by implication, answers to a number of other questions: What kind of claim against the vessel is permitted under the Amendments? Is there more than one such claim? If so, to whom do they belong at given times; do they depend on the same or different elements; and what is the relationship of the recoveries? The Court's decision here and the terms in which it is expressed will thus have implications affecting a number of the problems we have pointed out, concerning the nature and relationship of claims against third parties. These include questions concerning: the existence of a "lien" and the responsibility for protecting it; the possibility of successive suits against the shipowner, perhaps years apart; the responsibility for litigation expense; the allocation of proceeds; and the uniformity of treatment of employees and employers under the Act. Most importantly, the answer here will determine whether effect is to be given to the policy of the Act that negligent employers have an economic incentive for safety[64] and that the routine substitution of third-party suits for compensation and consequent diversion of

[64]S., Rep. *supra* note 17, at 2; H.R. Rep., *supra* note 20, at 4699.

funds to pay attorneys' fees and litigation expenses be discouraged.[65]

II. THE 1972 AMENDMENTS LIMIT RECOVERY TO THE PERCENTAGE OF DAMAGES EQUAL TO THE PERCENTAGE OF FAULT, AND NONE OF THE ARGUMENTS TO THE CONTRARY IS SUBSTANTIAL.

A. The Rule Applied in Limiting the Plaintiff's Recovery Below Follows Clearly From the Statute Itself, the Policy of the Statute And Equitable Principles

1. The Ruling Below Is Required by the Terms And Intent of the Statute

Since we are here concerned in detail with section 5(b)[66] of the Act, which was added in its entirety by the 1972 Amendments, we set out the text of it in full:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

[65] See text at note 20, *supra*.

[66] 33 U.S.C. § 905(b).

While the Amendment just quoted does not explicitly deal with questions of joint negligence of vessel and employer, it does contain evidence to indicate that the vessel is to be held only for the damages chargeable to its own negligence. The first sentence of the Amendment grants a general right of recovery against the vessel for negligence. The second and third sentences are qualifications of the grant dealing with the special situation in which the employer, who would otherwise not be subject to suit, is also an owner or other party identified as a "vessel"[67] against whom a right is granted in the first sentence. In such a case the employer is viewed for the purpose of the Act in two different capacities, on the one hand as vessel owner subject to suit and on the other hand as a stevedore liable to provide compensation benefits.[68]

There is a "natural presumption" that when the same words are used in different parts of a statute they are intended to have the same meaning[69] and it is generally

[67] *See* 33 U.S.C. § 902(21).

[68] This is more fully explained in H.R. Rep. *supra* note 20.

[69] *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932).

held that identical words used in the same section more than once will be so construed.[70]

If "the negligence of a vessel" in the first sentence is read to mean any negligence of the vessel at all and "the negligence of persons" in the second sentence is given a similar reading to refer to any negligence at all, then an absurd inconsistency of results appears, since the employee of an independent contractor, subject only to the first sentence, will then recover 100% of his damages even though his fellow employees rendering stevedoring services have committed 99% of the negligence, while a longshoreman employed by the vessel owner and subject to the qualifications of the second sentence, would recover none of his damages at all if his fellow longshoremen committed even 1% of the negligence.

Thus, section 5(b) of the Act cannot be read literally throughout and must be internally reconciled. The section may be harmonized by recognizing that the words "caused by the negligence" in the first, second and third sentences contemplate not just the fact but the extent of causation. As the court below *en banc* noted, such a reading harmonizes these sentences.[71] The words "if the injury was caused" in the second and third sentences should be read to mean "to the extent the injury was caused" and the first, or granting, sentence should accordingly be construed as qualified in the same way, to conform to the specific exceptions stated in the second and third sentences following it.

[70] *Meyer v. United States*, 175 F.2d 45, 47 (2d Cir. 1949), quoting *Lewellyn v. Harbison*, 31 F.2d 740, 742 (3d Cir. 1929).

[71] 577 F.2d at 1155, 1978 A.M.C. at 1674.

The interpretation of all three sentences in this way, authorizing recovery of the portion of damages allocable to the defendant, averts a collision of principle between these sentences and achieves consistent results in the cases with which they deal.[72] It is no answer to point out, as others do at length,[73] how the second and third sentences were intended to deal with direct employees of shipowners, as though that deprived them of significance here. The shipowners start from that point and recognize that, whether the two sentences confer new rights upon certain longshoremen or only emphasize that shipowners are not to be held for stevedore negligence,[74] their effect upon the construction of the statute for this case is the same.

The resulting rule is the only possible rule consistent with the terms of the Act which is completely equitable. It charges the vessel owner with only his fair share of the damages done, denies indemnity to the stevedore employer for that portion, and only that portion, of the compensation loss fairly allocable to the employer's own fault and leaves the longshore worker protected, since, to the very extent that his immediate lump sum damages in his third-party

[72] If possible, all sections of a statute must be reconciled so as to produce a symmetrical and harmonious whole. *See, e.g., Federal Power Comm'n v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 514 (1949). Moreover, the result would comply with the expressed legislative intent . . . "that the same principles should apply in determining liability of the vessel which employs its own longshoremen or ship builders or repairmen as apply when an independent contractor employs such persons." S. Rep. *supra* note 17, at 12.

[73] Petitioner's Brief at 29-33; *Amicus* Liberty Mutual Insurance Company's Brief at 25-26; *Amicus* National Association of Stevedores' Brief at 10-12.

[74] *Baker v. Pacific Far East Lines, Inc.*, 451 F. Supp. 84, 1978 A.M.C. 1859 (N.D. Cal. 1978).

action (taken as a credit by the employer)[75] are reduced, the potential value of future compensation payments, in which he has a lifelong security, will be enhanced.[76]

The rule is fully consistent with that section of the Act providing that the employer "shall not be liable to the vessel for *such damages* [*i.e.,* the damages paid an injured longshoreman by a negligent vessel owner] directly or indirectly. [77] The drafters of the Act intended this language to eliminate the usual *Ryan* indemnity suit whereby the stevedore was subject to dual liability for compensation benefits and damages. Since the stevedore's maximum exposure is limited to the amounts set forth in the Act and the stevedore is not called upon to reimburse the vessel for any damages paid plaintiff, the rule conforms to both the letter and intent of the Act.

The rule is also consistent with the intent of the drafters that the vessel "shall not be liable in damages for acts or omissions of stevedores".[77a] If the vessel were liable under the Act or to the full extent of common law damages, when it was only 1% negligent while the stevedore was 99% negligent, then the vessel would indeed be liable for negligence of the stevedore.

While there is unquestionably a conflict between the decision below and decisions in other circuits, both the

[75]33 U.S.C. § 933(f).

[76]The rule here has nothing to do with the fellow-servant doctrine, a rule under which formerly an employee's recovery of damage from his employer was defeated if his injury was caused by his co-employees rather than by his employer personally. What is urged here is that, under the statute, the worker's recovery from a third party (not his employer) be not defeated but limited to the fault of the third party.

[77]33 U.S.C. § 905(b) (emphasis added).

[77a]H.R. Rep., *supra* note 20, at 4703.

scope of the conflict and the weight of the other decisions have been exaggerated in some of the briefs. Examination will show conflict only with the Fifth and Ninth Circuits. The Fifth Circuit decision in the *Samuels* case[78] relies on the earlier Ninth Circuit decisions (on consolidated hearing) in the *Dodge* and *Shellman* cases.[79] *Dodge* and *Shellman* unquestionably reject the result reached by the court below, but it seems proper to suggest that they are entitled to limited respect since the court, while fully aware of the inequity of its decision,[80] failed to analyze the 1972 Amendments to determine whether they offered the opportunity to reach a fairer result and so disposed of them by application of *Halcyon.*

2. The Ruling Furthers the Policy of the Act to Promote Safety

The decision of the court below is consistent with the longstanding efforts of the courts and Congress to promote safety on the waterfront by imposing the cost of injuries on the party in the position to avoid harm. Well before the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, this Court in *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.,*[81] recognized that the stevedore employer, actually directing his activities and supplying or deploying the equipment involved, had ordinarily the best opportunity to promote the

[78]*Samuels v. Empresa Lineas Maritimas Argentinas,* 573 F.2d 884, 1978 A.M.C. 1647 (1978).

[79]*Dodge v. Mitsui Shintaku Ginko K.K.,* 528 F.2d 669, 1975 A.M.C. 2462 (9th Cir. 1975); *Shellman v. United States Lines, Inc.,* 528 F.2d 675, 1975 A.M.C. 2471 (9th Cir. 1975).

[80]528 F.2d at 672, 680, 1975 A.M.C. at 2467, 2478-79.

[81]376 U.S. 315, 1964 A.M.C. 1075 (1964).

safety of the longshoremen and should bear the principal burden of doing so.

In connection with the 1972 Amendments, both the House and Senate committees also recognized this truth and asserted their intention to give it effect:

> It is important to note that adequate workmen's compensation benefits are not only essential to meeting the needs of the injured employee and his family but, by assuring that the employer bears the cost of unsafe conditions, serves to strengthen the employer's incentive to provide the fullest measure of on-the-job safety.[82]

And the courts have recognized this intention of the 1972 Amendments to focus responsibility upon the stevedore employer. The Court of Appeals for the Third Circuit has said:

> As Judge Van Dusen has recently observed, speaking for this court, "express language in the statute and the legislative reports accompanying the 1972 Amendments amply demonstrate that for reasons of policy the major responsibility for the proper and safe conduct of the work was to be borne by the stevedore." . . . This was an important aspect of the legislative plan, intended to focus responsibility for the longshoremen's safety on those best able to improve it, the stevedores. To say that responsibility is concurrent or joint is plainly inconsistent with the intention of the Act to place primary responsibility on the stevedore.[83]

The Court of Appeals for the Second Circuit has said:

> Since the stowage of cargo . . . was peculiarly the responsibility of UMS, we would be remiss in our duty

[82]H.R. Rep., *supra* note 20, at 4699, S. Rep., *supra* note 17, at 2.

[83]*Marant v. Farrell Lines, Inc.*, 550 F.2d 142, 1977 A.M.C. 267, 270 (3d Cir. 1977).

> to other harbor workers if we required the owner to pay for the stevedore's negligence. All incentives for the stevedore to monitor unsafe procedures would then be lost for under the Act the stevedore is immune from indemnity actions.[84]

And, in an early case considering the 1972 Amendments, the District Court for the Eastern District of Pennsylvania said:

> We cannot at this time fashion the outlines of the negligence remedy Congress allowed to be brought against the vessel . . . . It is clear, however, that Congress decided that the primary duty to provide a safe place to work is on the stevedore. The substantial increase in compensation benefits provided by the amendments was thought to be an incentive to the stevedore to provide a safe place to work . . . . Courts should recognize that this duty falls primarily on the stevedore and not on the vessel owner.[85]

In the former state of the law the recognized policy of imposing the burden of safety upon the party best situated to carry it was ordinarily given effect by the circuitous and expensive process of first imposing liability upon the vessel and then passing it on to the employer through an indemnity suit.

As we have seen, it is the aim of the 1972 Amendments to eliminate the wasteful economic load of that process by ordinarily resting the burden upon the employer in the first instance through compensation payments. Once the

[84]*Munoz v. Flota Merchante Grancolombiana, S.A.*, 553 F.2d 837, 841, 1977 A.M.C. 843, 847-48 (2d Cir. 1977).

[85]*Lucas v. "Brinknes" Schiffahrts Ges.*, 379 F.Supp. 759, 768-69, 1974 A.M.C. 1085, 1099-1100 (E.D. Pa. 1974).

burden is laid upon the vessel, however, the possibility of passing any portion of it on to the stevedore employer by way of contribution or indemnity has been eliminated.[86]

But it is still a fairly obvious truth that when, as usual, a stevedore is in actual control of the work, with its employees present in numbers, any negligence of the vessel with respect to a condition or procedure involved will, as a practical matter, usually be exceeded by the concurrent negligence of the stevedore.[87] The rule applied below will prevent the wholesale shifting of the burden of the stevedores' negligence to the ship owner and the consequent frustration of the Congressional intent to provide a sharp incentive for safety.

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[86]33 U.S.C. § 905(b); *cf. United States v. Seckinger*, 397 U.S. 203 (1970).

[87]Recent decisions apportioning liability have confirmed the Court's statements in *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.*, 376 U.S. 315, 323-24, 1964 A.M.C. 1075, 1081-83 (1964) that the stevedore's immediate presence and supervision provide it the greater opportunity to minimize the risks of injury. In the case at bar the stevedore's negligence was 70% and the vessel owner's negligence 20%; in *Shellman v. United States Lines, Inc.* 528 F.2d 675, 1975 A.M.C. 2471 (9th Cir. 1975), the stevedore accounted for 70% of the negligence. In *Zapico v. Bucyrus-Erie Co.*, 579 F.2d 714, 1978 A.M.C. 1629 (2d Cir. 1978), the stevedore and the cargo owner were each found 50% at fault. In the following cases the stevedore was also found 50% at fault: *Marant v. Farrell Lines, Inc.*, 550 F.2d 142, 1977 A.M.C. 267 (3d Cir. 1977); *Dodge v. Mitsui Shintaku Ginko K.K.*, 528 F.2d 669, 1975 A.M.C. 2462 (9th Cir. 1975); *Frasca v. Prudential-Grace Lines*, 394 F. Supp. 1092, 1975 A.M.C. 1130 (D. Md. 1975). In *Hubbard v. Great Pacific Shipping Co.*, 404 F. Supp. 1242, 1975 A.M.C. 1518 (D. Or. 1975), the stevedore's negligence was 20%, but in *Crowshaw v. Koninklijke Nedlloyd, B.V. Rijswijk*, 398 F. Supp. 1224, 1975 A.M.C. 2630 (D. Or. 1975), the stevedore was 30% negligent, the plaintiff 50% and the shipowner 20%.

3. The Ruling Harmonizes the Law With Respect to Workers Similarly Situated Under This And Other Federal Compensation Statutes

The foundation principles of the rule adopted by the court below *en banc* are applied, even though precisely the same result is not reached, in a line of cases in the District of Columbia. Those start with *Martello v. Hawley*,[88] holding that where one joint tortfeasor has compromised the claim, the other tortfeasor, since he cannot obtain contribution because the settling tortfeasor has bought his peace, is nevertheless protected by having the tort judgment reduced one-half, upon the basis that one-half of the claim has been sold by the claimant when he executes the settlement. This even disposition was evidently dictated by District of Columbia doctrine, which did not discriminate finely between degrees of negligence.

In *Murray v. United States*,[89] the plaintiff was under the Federal Employees' Compensation Act and the government, whom she could not sue under the provisions of that Act, was considered jointly at fault. The doctrine of the *Martello* case was applied to reduce her recovery against a third party by 50% to avoid the inequity resulting from the circumstances that contribution from the government was not legally available to the third party.

In *Dawson v. Contractors Transport Corp.*,[90] a similar situation arose under the Longshoremen's and Harbor Workers' Compensation Act, the general private employers' compensation act of the District of Columbia. The court

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[88]300 F.2d 721 (D.C. Cir. 1962).

[89]405 F.2d 1361 (D.C. Cir. 1968).

[90]467 F.2d 727 (D.C. Cir. 1972).

there held the doctrine of the *Murray* case applicable under the Act and analyzed it as a general equitable doctrine in the context of workmen's compensation claims. (The precise question presented was whether the issue was to be decided by a jury, and the determination was that it was an equitable question for nonjury determination.)

While the underlying equitable principle of these cases is correct, the result of applying the rigid 50-50 rule of the District of Columbia, rather than the more flexible and responsive maritime rule of proportional fault, could in many cases produce unfairness, which is avoided under the rule of the court below. The *Dawson* case belies the statement in *Amicus* Liberty Mutual Insurance Company's Brief (p. 28) that "apportionment" is not provided under the Act between the employer and third-party tortfeasors other than shipowners, a statement which also misses the point that we are considering here the terms of an amendment intended to provide special relief in connection with recognized problems relating to shipowners' liabilities.

4. The Rule Is Equitable in All Respects

The result reached below not only promotes safety and uniformity; it also avoids the injustice of the contrary result. The inequity resulting from the imposition of liability for the stevedore's negligence was acknowledged even by the Ninth Circuit in the *Dodge* and *Shellman* decisions.[91] It has been especially deplored by district courts, who are closest to the realities of the situation and unable as a result of current doctrine in their circuits to make reasonable adjustments of liability in the circumstances with which they intimately deal. The district judge said in *Crowshaw v. Koninklijke Nedlloyd, B.V. Rijswijk.*[92]

> The inequities of this program are obvious. If the stevedore were 90% negligent, the 10% negligence of the shipowner would be sufficient to cripple him with the entire judgment. . . .
>
> . . . .
>
> The manifest injustice of subjecting a joint tortfeasor to an arbitrary level of damages despite minimum culpability was condemned by the U. S. Supreme Court [in *United States v. Reliable Transfer Co.*, 421 U.S. 397, 1975 A.M.C. 541 (1975)].

In the trial court below, the district judge said:

> In the light of this authority [citations, including *Dodge* and *Shellman*], we, *reluctantly*, reverse our previous stand. It now appears that a 20% negligent shipowner must bear the entire brunt of the damage award without contribution from a 70% negligent employer-stevedore, who not only pays not one cent but recovers the compensation benefits paid the employee. We invite the Court of Appeals of this Circuit to examine this matter.[93]

The rule applied to the damages below is correct because it, and it alone, assures equitable results, reducing recovery, under maritime principles by the percentage of total negligence attributable to the injured longshoreman and other employees of the suing stevedore. The rough

[91] *Dodge v. Mitsui Shintaku Ginko K.K.*, 528 F.2d 669, 672, 1975 A.M.C. 2462, 2467 (9th Cir. 1975); *Shellman v. United States Lines, Inc.*, 528 F.2d 675, 680, 1975 A.M.C. 2471, 2478-79 (9th Cir. 1975).

[92] 398 F. Supp. 1224, 1232, 1233, 1975 A.M.C. 2630, 2640, 2641 (D. Or. 1975).

[93] *Edmonds v. Compagnie Generale Transatlantique*, 1976 A.M.C. 1027, 1030 (E.D. Va. 1976) (not otherwise reported).

justice of the District of Columbia cases would not apply. The reasoning of this Court in *United States v. Reliable Transfer Co.* [94] would indicate that the general application of the proportional rule to maritime cases of shared responsibility is all but settled and it is in the tradition of admiralty to recognize the equitable rule applied by the court below.

The result would be the same in a case of statutory assignment to the employer as in any other case. The statutory assignment is in the nature of subrogation, which is equitable; the assignee of a chose in action has an "equitable ownership".[95] The doctrines of equity obtain in admiralty and therefore apply to maritime cases.[96] Accordingly, the shipowner would be entitled to have any recovery reduced not only by the percentage of the injured man's negligence, if any, but also to the extent that the suing party (the stevedore) had otherwise negligently caused the injury. This follows not only from the rule that no one should benefit from his own wrong but from the central principle of equity. Equitable principles will allow the defendant not only the defenses which he had against the assignor, but those based upon the assignee's conduct. Thus, for example, in the maritime context, the law limits recovery by an assignee to the amount which he paid to acquire the claim.[97]

[94]421 U.S. 397, 1975 A.M.C. 541 (1975).

[95]*Gruner v. New York Trust Co. v. United States*, 295 N.Y. 510, 68 N.E.2d 514, 167 A.L.R. 628, 638 (1946).

[96]*Watts v. Camors*, 115 U.S. 353 (1885); *Vaughan v. Atkinson*, 369 U.S. 527, 1962 A.M.C. 1131 (1962).

[97]*The PERTH AMBOY #2*, 110 F.2d 644, 1940 A.M.C. 621 (2d Cir. 1940); *The GULFSTREAM*, 64 F. 8-9 (2d Cir. 1894); *see The MARISKA*, 107 F. 989 (7th Cir. 1901); *The HUDSON*, 15 F. 162 (S.D.N.Y. 1883). We do not suggest that the rule of limitation to purchase price would itself be applicable in the circumstances of a workmen's compensation claim, because of the employee's statutory interest in the residue of any recovery and the employer's consequent status as a trustee, but the authorities on the point illustrate the operation of equity and the availability of defenses peculiar to the assignee.

In our view, a harmonious approach to the problem of the employer's recovery is reached by the consistent application of the equitable doctrine which we have so far advocated. The fund is to be distributed on equitable principles, *pro rata*, to the parties interested in it. The result is that the employer receives back exactly the fair portion of his past compensation expenses attributable to the third-party negligence and, while the worker's immediate recovery is thereby reduced, he is dollar for dollar that much closer to the threshold of new compensation benefits.[98] The same principle will, under this system, apply automatically to credits on future compensation. As the total third-party recovery is reduced for employer fault, the amount of credit on future compensation is ac-

[98]The authors of thoughtful law review articles, Cohen and Dougherty, *supra* note 9, and R. Coleman and W. Daly, *Equitable Credit: Apportionment of Damages According to Fault in Tripartite Litigation under the 1972 Amendments to the Longshoremen's and Harborworkers' Compensation Act*, 35 Md. L. Rev. 351 (1976), have advocated interpretations similar in major respects to those we urge, but propose to deny the employer indemnity for its compensation expense, in whole or in part, upon the basis of a different formula, *viz.*, reduction of the employer's recoupment by the dollar amount by which the judgment was reduced on account of employer negligence, apart from plaintiff's contributory negligence. This formula appears to turn on considerations of fault between employer and employee and thus create conflict of interest between them. Judge Skopil, in *Crowshaw v. Koninklijke Nedlloyd B. V. Rijswijk*, *supra* note 92, appears to endorse this proposal. Cohen and Dougherty also appear to advocate that vessels be permitted to implead employers in third-party actions; that is a procedure we consider wholly inappropriate and unnecessary, as we explain in III, *infra*.

cordingly reduced and the corresponding burden on the employer occasioned by its own negligence is not lifted from him by indemnification.[99]

B. The Arguments Urged Against the Ruling Below Are Without Merit

1. The Question Is Not at All Whether the Longshoreman Is to Be Well Compensated But Rather How the Burden of His Liberal Compensation Is to Be Borne

As the court below pointed out, the result was by no means harsh upon the longshoreman.[100] While the result below is probably less generous to lawyers than the result which petitioners seek, the decision involves no harshness or injustice to injured workmen. Petitioner's allegation of harsh inequity worked upon the longshoremen (Brief at 41) is unsupported by anything in the record or briefs here. It is insupportable for the generality of cases when one considers the liberal compensation benefits now provided under the Act,[101] and insupportable for this case, in particular, based upon the figures actually involved.[102]

[99]Where the employer brings the suit and distribution of proceeds is therefore controlled by the provisions of 33 U.S.C. § 933(e) authorizing the employer to retain past expenses and the present value of estimated or scheduled future compensation, a similar result should be reached by viewing the recovery fund as comprising two distinct, if presently unliquidated, interests and limiting the employer's distribution to itself to the value of its interest in the fund as reduced by the percentage of employer fault.

[100]577 F.2d at 1156, 1978 A.M.C. at 1675-76.

[101]E. Vickery, "Some Aspects of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act," 41 Ins. Counsel J. 63 n.3 (1974).

[102]As of the end of 1978, compensation benefits to Edmonds totalled about $49,500 (see *Amicus* Liberty Mutual Insurance Company's Brief at 2.) If Edmonds had recovered the full $90,000

The real question in the first instance is how far the primary burden of compensating the injured workmen can be shifted to the shipowner by an employer who is himself negligent. This shift occurs when the employee recovers unlimited damages and the employer, despite his negligence, is permitted to obtain a full recoupment of past payments and full credit for future ones. Such a shift also occurs by very reason of the encouragement given to third-party suits in preference to compensation, when such suits not only hold out the lure of large sums of ready money for the employee, but also stimulate the greed of his counsel upon a similar basis.

Of course it may be said, and indeed we have said,[103] that the economic burden ultimately comes to rest upon shipowners through the premiums they pay for the stevedores' compensation insurance as a major and discrete element of stevedoring rates and the premiums they pay in their own insurance for protection against damage. But the weight of this burden is affected by the directness and efficiency with which it is managed. There can be little doubt that the most direct and efficient management is through the compensation system so that the burden is carried in the stevedores' compensation premiums, which are passed on to the shipowner as one of his charges. Every time the burden is shifted over to the shipowner's own insurance,

($100,000 less 10% for his own contributory negligence), his attorneys' fees would surely consume one-third (a conservative estimate) or $30,000, leaving $60,000, and when other expenses of litigation at the trial court level alone were substracted from the remaining amount, Edmonds would surely have little if anything after repaying Liberty Mutual Insurance Company the $49,500 of compensation benefit. It is difficult to see how anyone but lawyers benefit from this state of affairs.

[103]See paragraph 2, Statement of Interest, *supra*.

it is done by a costly and inefficient litigation. Whether he wins or loses it, the shipowner has the added burden of attorneys' fees and other litigation expenses, and if the longshoreman "wins", the amount actually paid to the longshoreman and credited to his compensation may be only half or a little more of the judgment, after deduction for his own attorneys' fees and expenses. It was this burden of litigation expense together with its attendant burden on the courts which Congress hoped largely to alleviate by amending the Act.[104]

2. The Question Is Not One of "Joint and Several Liability", a Formula Not Involved Here

Petitioner invokes the formula of "joint and several liability" (Brief, p. 22) and, even more than the petitioner, some of *amici* dwell upon the notion as a guideline for the present issue. This formula, which is not a principle, but a conclusion reached in other circumstances, has no application here and as an analogy will not bear analysis. Even the policy which supports it in other circumstances will not support it here. It is presented here as a "buzz" phrase.

The expression has always been applied to the liability of joint tortfeasors for the damages suffered by their common claimant. And we see it thus correctly used in *Amicus* Association of Trial Lawyers of America's Brief (p. 5). But here we do not have joint tortfeasors liable for damages. We have one possible tortfeasor, the shipowner, liable for damages and another party, the stevedore-employer, liable for no damages for tort or any other reason but liable for compensation payments under a statutory schedule regardless of fault. So much for their several liabilities. As for joint liability, no one even contends that the shipowner is liable for compensation payments or that the stevedore employer is liable for damages. The expression is a complete misfit to the present case.

[104] See text at note 21, *supra*.

Petitioner's brief (p. 22) states:

> [I]f Congress did not change the previously followed rule of joint and several liability, then we can presume Congress intended that that rule continue in force and effect.

But there was no previous rule of joint and several liability, as the expression had no application to the situations of the parties. The brief of *Amicus* Association of Trial Lawyers of America, while incorrectly arguing from the formula of joint and several liability, does at least correctly state its meaning "that each one is liable for the whole damages" and cites cases as authority for that statement (p. 5). Distinguished counsel for *Amicus* Liberty Mutual Insurance Company has rightly denied that the stevedore is to be viewed as a tortfeasor and pointed out that there is no joint liability (Brief, p. 3) and thereafter, drops the word "joint" from the formula (Brief, pp. 5-7). What the reader is not expected to notice is that when the word "joint" disappears from the phrase, there is nothing left of it, since its only significance is to indicate that, although a liability be joint it may be collected in full from either debtor. To speak only about several liabilities is to speak of what is absolutely commonplace, that is, the distinctive, personal obligation of one party to another, unaffected by rights or claims either may possibly have against

a third. The use of the formula "joint and several liability" is an attempt to beg the question here, which is not whether the different liabilities of shipowner and stevedore can be collected from the other, but rather what is the several and distinctive liability of the shipowner, a liability in which the stevedore disavows joinder. *Amicus* then goes on to support the eviscerated formula with three well known cases of joint and several liability between tortfeasors actually jointly responsible for damages to an innocent party[105] and two cases involving no joint liability whatever, but only liability of a single party.[106]

A rule which imposes full liability on one of two or more negligent parties can instantly be recognized as unjust.[107] Two rationales for such an injustice have been proffered, and it may easily be seen that neither commands much force against the simple justice of the decision below. The first is that a rule of joint and several liability among tortfeasors assures adequate compensation of injured plaintiffs. The California Supreme Court recently held that the rule of joint and several liability survived the judicial declaration of comparative negligence. In so holding, the court described the function of the rule as follows:

> Finally, from a realistic standpoint, we think . . . abandonment of the joint and several liability rule

[105] *The WASHINGTON and The GREGORY*, 76 U.S. (9 Wall.) 513 (1870); *The ALABAMA and The GAMECOCK*, 92 U.S. 695 (1876); *Phoenix Insurance Co. v. The ATLAS*, 93 U.S. 302 (1876).

[106] *The CHATAHOOCHEE*, 173 U.S. 540 (1899); *The SUCARSECO*, 294 U.S. 394 (1935).

[107] There is obvious lack of sense and justice in a rule which permits the entire burden of an accident, for which two defendants were equally, unintentionally to blame, to be shouldered onto one alone . . . ." W. Prosser, *Joint Torts and Several Liability*, 25 Cal. L. Rev. 413, 427 (1937).

> would work a serious and unwarranted deleterious effect on the pratical ability of negligently injured persons to receive adequate compensation for their injuries. One of the principal by-products of the joint and several liability rule is that it frequently permits an injured person to obtain full recovery for his injuries even when one or more of the responsible parties do not have the financial resources to cover their liability. In such a case the rule recognizes that fairness dictates that the "wronged party should not be deprived of his right to redress," but that "[t]he wrongdoers should be left to work out between themselves any apportionment." *(Summers v. Tice* (1948) 33 Cal. 2d 85, 88.)[108]

The policy expressed by this quotation is a useful analogy in a workers' compensation setting only when the compensation benefits are inadequate. For example, before the 1972 Amendments, the compensation remedy was limited to $70 per week and a $24,000 maximum for partial disability.[109] Under such a system, concern that plaintiff have full recovery of traditional tort damages understandably outweighed concerns spawned of the desire for a just and precise allocation of fault. Imposition of significant liability on a minimally negligent defendant may be perceived as the better solution to the moral dilemma posed by the inadequacy of the compensation benefits. But today, potential plaintiffs in Edmonds' position come before the Court with less compelling justification for their assertion that they are entitled to full recognition of all their interests

[108] *American Motorcycle Association v. Superior Court*, 20 Cal. 3d 578, 590, 146 Cal. Rptr. 182, 189, 578 P.2d 899, 906 (1978).

[109] Act of July 14, 1961, Pub. L. 87-87 §§ 1, 3, 75 Stat. 203, formerly 33 U.S.C. §§ 906(b) and 914(m).

before the valid claims of others receive their due. The modern compensation claimant comes to court having received satisfaction for his claim for two-thirds of his lost wages, effectively supplemented by freedom from income taxation, and his claim for medical expenses. And he is further protected against inflation, taxes, medical expenses, rehabilitation expenses, and from the attorneys' fees, expenses, uncertainties and delays historically associated with adequate recovery for disabling injuries. The best parts of justice, compassion for the unfortunate and concern for the dignity of the family of the disabled, have been satisfied.

The 1972 Amendments have instituted qualitatively different levels of benefits satisfying the fundamental compensation purposes of accident law. To continue to resort to the rubric of "full compensation" is to ignore the substantial adequacy of the benefits, at the cost of safety on the waterfront and the further cost of avoidable injustice to defendants. The decision below is a just resolution of these competing interests and a denial of defendant's interests in deference to fuller compensation of plaintiff is not justified.

A second justification for the analogy to joint and several liability is said to be the absence of "any logical basis for apportionment".[110] While it is true that any injury caused by the concurrent negligence of the stevedore and the shipowner is as indivisable as any other injury with two causes, a basis for apportionment does exist. Liability may be apportioned among the negligent parties by comparing

[110]Prosser, *supra* note 117, at 432.

their negligence.[111] It is plain that the apportionment of liability on the basis of fault is preferable to the blind imposition of all of the liability on any one party, and hence it is a long-standing doctrine in the maritime law (in contrast to the common law) that even when a judgment is rendered against joint tortfeasors, it should provide for payment by each of only his proper share, unless and until it be shown that the other's share cannot be obtained from him.[112]

The concerns which might call forth the analogy to joint and several liability are no longer present in suits between the longshoremen and the vessel, and there is no cause to resort to such a rule and miss the opportunity to reach the just result.

The decision that the shipowner is not to be liable for the proportion of damages equal to the employer's negligence does not imply a general abandonment of the doctrine of joint and several liability among concurrent tortfeasors. The rule below does not require that a vessel, liable only for damages attributable to its own negligence, could or should reduce its damages on the ground that some other tortfeasor, whether present or absent, solvent or insolvent, should be pursued by plaintiff. Each non-employer party who was negligent may be held jointly and severally liable for damages assessed against non-employers.

[111]*United States v. Reliable Transfer Co.*, 421 U.S. 397, 1975 A.M.C. 541 (1975).

[112]*The VIRGINIA EHRMAN*, 97 U.S. 309 (1878); *The ALABAMA and The GAMECOCK*, 92 U.S. 695 (1876); *The WASHINGTON* and *The GREGORY*, 76 U.S. (9 Wall.) 513 (1870).

In sum, any attempt to apply a rule derived from the concepts of joint and several liability to the Longshoremen's and Harbor Workers' Compensation Act setting should be viewed with skepticism. The rule serves primarily to impose the risk of insolvency or absence of one defendant on another defendant instead of on the plaintiff. In the compensation scheme, immunity of the employer from suit may be reasonably analogized to absence or insolvency only when the compensation benefits are less than conscience demands. When those benefits are adequate, a rule further preferring the plaintiff is not necessary, and since the application of such a rule less effectively serves both justice and safety, there is no rational ground for choosing such a rule over the simple rule derived from modern concepts of comparative negligence.

3. The Question Involved Is Not of Contribution But Whether the Negligent Employer Is to Be Fully Indemnified

A result different from that reached below would mean that the stevedore, notwithstanding even its predominant fault, would be fully indemnified at the expense of the third party. This would open a new chapter in the book of inequities to succeed those of *Halcyon* and *Ryan*.

What the employer seeks out of the third-party action is to be made absolutely whole for its loss. If this is not a claim for indemnity, then neither were the shipowner's claims in the *Ryan* line of cases.[113] It has been said that the

[113] *See* Black's Law Dictionary 910 (4th ed. 1968): "Indemnify . . . to make good; to compensate; to make reimbursement to one of a loss already incurred by him"; and "Indemnity . . . a compensation given to make the person whole from a loss already sustained".

denial of full recovery to the negligent employer is an exaction of contribution forbidden by the statute. Under the rule announced below, the shipowner does not sue the stevedore nor claim from him any contribution whatever to the amount of damages which the shipowner is adjudged to pay the longshoreman. The stevedore would make no payment whatever, at any time, except payments of scheduled compensation benefits under the Act. To say that the denial of full indemnity to the negligent employer is an unlawful contribution on his part is a perversion of language.

It is a corruption of language also to say that the denial of full indemnity to the negligent stevedore violates the new provision of the Act that "the employer shall not be liable to the vessel for such damage." By those words the statute protects the employer from being required to contribute to a judgment of damages. But neither here nor elsewhere does the Act manifest a purpose to protect him from having to pay normal compensation benefits which may not be recoverable in full. Neither is there the slightest indication in the letter or the spirit of the Act that the employer should be fully indemnified despite its own fault. Even agreements between parties contemplating indemnity for one's own fault are required to be most explicit on that point to be effective.[114] We can imagine no reason why the rule as to statutes would be less stringent.

[114] "[A] contract provision should not be construed to permit an indemnitee to recover for his own negligence unless the court is firmly convinced that such an interpretation reflects the intention of the parties." *United States v. Seckinger*, 397 U.S. 203, 211 (1970); *United States v. Nielson*, 349 U.S. 129, 131-32, 1955 A.M.C. 935, 937 (1955).

While it is true, as pointed out in the brief of *Amicus*, Liberty Mutual Insurance Company (p. 27), that this Court said the non-repayment of any compensation benefits under the circumstances presented in *Pope & Talbot v. Hawn*[115] "would be the substantial equivalent of contribution", the court did not make the mistake of saying that *Pope & Talbot* involved actual contribution.

The proposition rejected in *Pope & Talbot* was that a negligent shipowner[116] could totally deny a partially negligent employer all recovery on the compensation lien. This draconian result was proposed based upon no known legal theory. The closest analogy was contribution, which the Court had so recently rejected in *Halcyon*.[117]

The result urged here, however, is the imposition of liability on the shipowner based upon its percentage of negligence and the amount of plaintiff's damages, in accordance with long-accepted maritime principles. If this result bears any relation to contribution, it lies only in the fact that the stevedore's recovery leaves it with fewer dollars at the end. Actual contribution by the stevedore is never attained, for the stevedore never pays any money to the shipowner and can never be liable for more than the Act provides, regardless how great were its negligence and the resulting damage. Since actual contribution is not involved, since the result is not the same as that urged in *Pope & Talbot v. Hawn*, and since the equitable rule advocated here comports with the fundamental principles

[115] 346 U.S. 406, 412, 1954 A.M.C. 1, 9 (1953).

[116] That Pope & Talbot was negligent is made clear by the Court of Appeals opinion. *Hawn v. Pope & Talbot, Inc.*, 198 F.2d 800, 802, 1952 A.M.C. 1708, 1709 (3d Cir. 1952).

[117] Note 32, *supra*.

of maritime law and the policies of the Act, whatever strained comparison may be drawn to contribution is irrelevant.

III. THE RULE APPLIED BELOW SHOULD NOT MULTIPLY OR COMPLICATE PROCEEDINGS AND THE PRESENCE OF THE EMPLOYER AS AN ADDITIONAL PARTY SHOULD NORMALLY BE UNNECCESSARY

A. There Is But a Single Claim or Cause of Action Against the Vessel, Having the Same Elements Whether Brought By the Longshoreman or By His Employer

It must be clear from reading Section 33[118] that the Act, from the beginning, contemplated but one third-party claim against the vessel arising from an injury, a claim which was clearly in the hands of either the employee or the employer, depending on whether an assignment had occurred, and which existed primarily for the recoupment of the employer's compensation expense and was ordinarily expected to be prosecuted by him, as evidenced by the expressed provision for the allocation of the proceeds of his recovery and lack of similar provision for a recovery by the employee.

In time, however, the pressures on the pre-Amendment Act produced the rulings in *Czaplicki v. HOEGH SILVERCLOUD*,[119] and *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*[120] under which, in some circumstances, claims

[118] 33 U.S.C. § 933.

[119] 351 U.S. 525, 1956 A.M.C. 1465 (1956).

[120] 394 U.S. 404, 1969 A.M.C. 745 (1969).

could be presented by both the worker and his employer. The latter case created the further problem of a disparity of grounds and defenses between the claims.

As we have pointed out above, however, there is a growing line of authority[121] in the lower courts toward reconciling the duties of the vessel to the longshoreman and to his employer, and hence the grounds of claims by either of them, under the terms of the 1972 Amendments, so that no distinction should now exist in the substance of rights involved.

The section of the 1972 Amendments describing the reformed third-party action against the vessel concludes with a further new provision: "The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter."[122] By this language and the absence from the Act of provision for any other remedies except for compensation benefits, Congress has melded the claims of employer and employee against the vessel, affirmed their singleness and unity, and put an end to the evil of concurrent or successive claims, whether under the doctrine of *Czaplicki* or that of *Burnside*.[123] This should be clearly recognized, particularly as there is no further need for separate claims under those doctrines. The abolition of indemnity by the 1972 Amendments eliminates the conflict of interest created by the *Ryan* case[124] and with it the reason for the *Czaplicki*

[121] Note 63, *supra*.

[122] 33 U.S.C. § 905(b).

[123] This view is in harmony with doctrine under the Federal Employee's Compensation Act. *See* 5 U.S.C. § 8131 and *Louisville & Nashville R.R. v. Rochelle*, 252 F.2d 730 (6th Cir. 1958).

[124] *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 1956 A.M.C. 9 (1956).

ruling. The decision in *Moragne v. States Marine Lines, Inc.*,[125] eliminates resort to state death acts in maritime cases and thus the limitations upon recovery which gave rise to the *Burnside* case. Thus the *Burnside* case, like the *Halcyon* case, is left behind by history.

The joint interests in recovery can now be fully protected without resort to separate suits. In the case of recovery by the employer on an assigned claim, allocation is fully controlled by the statute, administered by the compensation authorities. When the employee sues, equitable principles are perfectly adequate to protect the employer. The employer's interest in the suit as a means of recouping its high compensation exposure is obvious, while the employee has an equally obvious interest in any part of a damage recovery which may prove to exceed that exposure. Where the one party sues, in large part for the benefit of another, upon the jointly held claim, and receives money for the account of the other, he is, under equitable doctrine, regarded as a trustee and held to account.[126] This is consistent with the line of cases previously cited, under which the employer's recovery out of proceeds in the hands of the employee is put on an equitable basis.[127] This view would also lead to a disposition of the attorneys' fee problem on a clear and predictable basis; there is ample precedent for taking out of the fund the legal expenses

[125] 398 U.S. 375, 1970 A.M.C. 967 (1970).

[126] *United States Fidelity & Guaranty Co. v. United States*, 152 F. 2d 46, 48, 1945 A.M.C. 1513, 1516 (2d Cir. 1945) ("[T]he assignee holds it for the benefit of the employee so far as it is not necessary for his own recoupment. The assignee is in effect a trustee. . . .").

[127] See note 44, *supra*.

of creating it before allocating it among its beneficiaries[128] Thus, no matter whether the worker or the employer creates the fund, such fees and expenses should be taken off the top. Several courts have already reached this result.[129]

B. Only in Most Exceptional Circumstances Would There Be Any Occasion for Both the Longshoreman And His Employer to Be Parties in a Third-Party Action

The court below took special notice of the absence of the stevedore employer as a party.[130] Intervention by the stevedore might have facilitated full discussion of the issues presented. While that would have been, of course, entirely appropriate in the circumstances, such intervention will be found unnecessary and inappropriate in the administration of the rule in the normal case hereafter. And it is simply not true, as the brief of *Amicus* National Association of Stevedores says (p. 13), that "employer would be pitted against employee . . . in litigation."

The claim is one in which the longshoreman and his employer have a joint unliquidated interest. As a result of the harmonization of the shipowner's duties to both of them, the longshoreman plaintiff bringing suit upon the joint claims has on every issue the same interest as his

[128] *E.g., United States v. Equitable Trust Co.*, 283 U.S. 738 (1931); *United States v. Anglin & Stevenson*, 145 F.2d 622 (10th Cir. 1944); *see Sprague v. Ticonic Bank*, 307 U.S. 161, 166-67 (1939).

[129] *Valentino v. Rickners Rhederei, G.M.B.H.*, 552 F.2d 466, 1977 A.M.C. 1618 (2d Cir. 1977); *Swift v. Bolten*, 517 F.2d 368, 1975 A.M.C. 1515 (4th Cir. 1975); *Brown v. American Mail Line, Ltd.*, 437 F. Supp. 628, 1977 A.M.C. 2526 (D. Or. 1977); *contra Cella v. Partenreederei MS Ravenna*, 529 F.2d 15, 1976 A.M.C. 600 (1st Cir. 1975).

[130] 577 F.2d at 1156, 1978 A.M.C. at 1676.

employer. There is nothing novel about joint interests being so represented and all interested parties being bound by the results, where, as here, the party suing is properly situated, without conflict of interest, to represent the interests of all.[131] However, in our view the party suing, whether longshoreman or employer, is the trustee of the claim and it is certainly commonplace that the trustee has legal standing to represent and bind his beneficiary.[132] The practical side of the matter is that the conduct and circumstances to be examined in evaluating a longshoreman's third-party claim are affected little, if any at all, by raising the issue that other stevedore employees involved have been negligent.

A completely analogous situation arises when the employer brings suit and the contributory negligence of the employee is alleged. But no one supposes that it is necessary to bring in the employee by impleader or for him to intervene in a normal case. As a matter of common sense, the employer secures his cooperation as a person interested in the handling of that issue[133] and, equally as a matter of common sense, the employee will secure the assistance of the employer, as indeed he will do whether or not employer negligence is alleged.

The plaintiff should be viewed as a trustee and the interested employer, if it wishes, may routinely, in connec-

[131] This is familiar not only in class actions under Rule 23, Fed. R. Civ. P., but in other actions in the maritime context, as, for example, where the vessel owner may sue for collision on behalf of its cargo owners as well as itself and the owner of a salving vessel may likewise sue for salvage on behalf of its crew. *See* 2 *Benedict on Admiralty* § 249 (6th ed. 1940) and authorities there cited.

[132] *See* Rule 17(a), Fed. R. Civ. P.

[133] The employee's right to receive 80% of any excess judgment provides an interest in cooperating. 33 U.S.C. § 933(e).

tion with payment of compensation, make demand for notice should the issue of its negligence be raised in any third-party suit. The very most that should be expected, procedurally, is that, upon the presentation of an affirmative defense based upon the employer's negligence, the employee-plaintiff should tender the defense of such allegations to the employer, thereby placing the employer on notice and securing its assistance in the handling of the matter if, by chance, that were not already being provided. In the unusual case in which the employer felt its interests were inadequately represented in court, intervention would still be available upon appropriate allegations showing the need for it.[134]

Accordingly, the Court should not be misled by suggestions of procedural complication or multiplicity of suits.[135] The rule and principles urged here can, and should, be effectuated while preserving the simplicity and relative economy of the normal bilateral, or two-party, suit.

IV. ADOPTION OF THE RULE URGED HERE WILL FURTHER THE PURPOSES OF THE ACT, REDUCE FUTURE LITIGATION, AND MINIMIZE THE OCCURRENCE OF PROBLEMS IN RELATED AREAS

Compensation benefits under the Act do not result in placing a large lump sum in the injured employee's hands (a sum which is subject immediately to deduction of a high

[134]Rule 24(a), Fed. R. Civ. P. Such an intervention, if shown to be justified would probably affect the allocation of the plaintiff's attorneys' fees in prosecuting the action.

[135]*And see United States v. Reliable Transfer Co., supra* note 95, 421 U.S. at 407-08, 1975 A.M.C. at 550, where the Court rejects such an argument as an excuse for an unjust rule.

percentage for attorneys' fees and thereafter to the normal risk of prodigality). But, as a result of the 1972 Amendments, the benefits under the Act have been made truly liberal and provision has been made for their continued liberality in a changing economy. This has been accomplished principally by a formula basing disability benefits on 66⅔% of the worker's average weekly wage (free of taxation), with a maximum, determined from time to time, as a multiple of a current national average wage, while death benefits and other benefits have been similarly liberalized.[136] Moreover, the injured worker, under the compensation system, has the lifetime security of its medical benefits and liberal disability payments for later consequences of his injury, if he has not bargained that security away by entering into the settlement of a third-party lawsuit in the normal manner, which is to say without the written consent of his employer.

Third-party suits, of course, benefit the employer by recouping past expenses and by creating a credit against future compensation entitling him to deny further medical care or disability benefits until the amount of the credit is deemed exhausted. While the immediate lump sum in damages is often more attractive at the moment to the worker and especially to his lawyer, because of the fee the latter can thereby obtain, it is doubtful whether, in any but unusual cases, it is beneficial in the long run to the interests of the worker to prosecute a third-party action, the proceeds of which are subject to high attorneys' fees and

[136]33 U.S.C. §§ 906, 908-10. *See* H.R. Rep., *supra* note 20, at 4700-01. A convenient summary is also included in E. Vickery, *supra* note 101.

thereafter to the risk of investment loss and expenditure long before the credit threshold is crossed, entitling him once again (if he did not settle the case and lose his coverage) to receive compensation benefits.

Under a rule of proportionate liability, plaintiffs' attorneys will be very much less motivated to file suit where it can be seen that the major fault is the stevedore's. The rule will thus reduce litigation and tend to relieve crowded calendars and leave the courts more open to substantial, meritorious cases, while the injured workmen receive lifetime security under a generous compensation system.

The rule urged here will thus further the policies of the Act by providing both vessel and stevedore with measured incentives to safety and by withholding encouragement to a new wave of third-party actions and will replace the emphasis where it was always intended to be, upon compensation benefits.

It will give effect to current views on the distribution of loss and, for the first time in many years, establish an equitable relationship between shipowners and stevedores. It will harmonize the treatment of longshoremen and their employees under the Act with the treatment of the majority of workers and employees under the same Act and government employees and their employer under the companion federal Act.[137] It will harmonize the Act within itself by resolving the problem in the wording of section 5(b) under

[137] The same principle is applied even though the results in cases in the District of Columbia may be different because of the failure under local precedents to discriminate more finely than 50-50. When the practice in that respect changes in the District of Columbia, as it probably will, in keeping with current trends, results as well as principles will have reached agreement.

which otherwise an unacceptable disparity would exist between the treatment of claims by the longshoremen employees of independent contractors and those of shipowners.

Finally, if confirmed upon the equitable foundation which we urge, it will afford the means of avoiding in the future the past conflicts and confusion over the right to bring concurrent and successive suits, the time and parties involved in recovery of compensation expense and the allocation of attorneys' fees.

CONCLUSION

For the foregoing reasons, we submit that the judgment below should be affirmed.

GRAYDON S. STARING
Attorney for Pacific Merchant Shipping Association as Amicus Curiae.

Of Counsel:
LILLICK MCHOSE & CHARLES
EDWARD M. KEECH